Office - Supreme Court, U.S.
FILED
AUG 14 1982
ALEXANDER L. STEVAS
CLERK

No. 81-2375

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LAWRENCE J. EVANS JR.,

Appellant,

v.

STATE OF ARIZONA, EX REL. ARIZONA CORPORATION COMMISSION, ERNEST GARFIELD, B. L. "BUD" TIMS, and AL FARON, Commissioners and Members of the Arizona Corporation Commission,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF ARIZONA

MOTION TO DISMISS

Ronald A. Lebowitz
Shirley H. Frondorf
LEBOWITZ & FRONDORF
141 East Palm Lane
Suite 111
Phoenix, Arizona 85004

Counsel for Appellees

No. 81-2375

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LAWRENCE J. EVANS JR.,

Appellant,

v.

STATE OF ARIZONA, EX REL. ARIZONA CORPORATION COMMISSION, ERNEST GARFIELD, B. L. "BUD" TIMS, and AL FARON, Commissioners and Members of the Arizona Corporation Commission,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF ARIZONA

MOTION TO DISMISS

Ronald A. Lebowitz
Shirley H. Frondorf
LEBOWITZ & FRONDORF
141 East Palm Lane
Suite 111
Phoenix, Arizona 85004

Counsel for Appellees

TABLE OF CONTENTS

		Page
TABLE OF AUTHORITIES		iii
I.	OBJECT	1
II.	NATURE OF THE CASE	2
III.	REASONS WHY THIS COURT'S JURISDICTION HAS NOT BEEN PROPERLY INVOKED	5
	A. The Scope of Administrative Review Under Ariz. Rev. Stat. §41-785(D)(2), As Applied by the State Court, Is Not a Federal Issue	10
	B. The State Court's Ruling That the State Personnel Board is the Ultimate Fact-Finder and May Reverse the Findings of Its Hearing Officer Does Not Constitute a Federal Issue	14
	C. "Improper Attitude" As a Statutory Reason for Discharge Was Never Identified Or Litigated As a Federal Issue in the State Court. In Any Event, This Issue is	

Page

Governed by Arnett v. Kennedy [citation omitted] 18

CONCLUSION 25

CERTIFICATE OF SERVICE 26

TABLE OF AUTHORITIES

Cases	Page
Arnett v. Kennedy, 416 U.S. 134 (1974)	18, 20, 22
Board of Education of Tempe Union High School v. Lammle, 122 Ariz. 522, 526, 596 P.2d 48, 52 (App. 1979)	12
Civil Service Board of City of Phoenix v. Warren, 74 Ariz. 88, 244 P.2d 1157 (1952)	22
Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972), cert. denied 411 U.S. 972 (1973)	23
Evans v. State of Arizona ex rel. Arizona Corp. Com'n, ____ Ariz. ____, 643 P.2d 14 (Ariz. App. 1982)	4, 22
Garner v. Louisiana, 368 U.S. 157, 166 (1961)	13
Kannisto v. City and County of San Francisco, 541 F.2d 841 (9th Cir. 1976), cert. denied 430 U.S. 931 (1977)	23
McDonald v. Oregon Railroad & Navigation Co., 233 U.S. 665, 669-670 (1914)	13

Meehan v. Macy, 392 F.2d 822, 835 (D.C. Cir. 1968), modified 425 F.2d 469, aff'd en banc 425 F.2d 472 (D.C. Cir. 1969) 20

Morgan v. United States, 298 U.S. 468 (1936) 17

Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977) 23

Phillips v. Adult Probation Department of City and County of San Francisco, 491 F.2d 951 (9th Cir. 1974) 20

Pickering v. Board of Education, 391 U.S. 563 (1968) 22

Roseman v. Indiana University, 520 F.2d 1364 (3d Cir.), cert. denied 424 U.S. 921 (1975) 23

Smalley v. City of Eatonville, 640 F.2d 765 (5th Cir. 1981) 22

Sprague v. Fitzpatrick, 546 F. 2d 560 (3d Cir. 1976), cert. denied 431 U.S. 937 (1977) 23

Street v. New York, 394 U.S. 576, 582 (1969) 19

United States v. Raddatz, 447 U.S. 667, 680 (1980) 17

Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951) 17

Utica Mutual Insurance Co. v. Vincent, 375 F.2d 129, 132 (2d Cir.), cert. denied 389 U.S. 839 (1967) 17

Webb v. Webb, ____ U.S. ____, 101 S. Ct. 1889 (1981) 19

Wishart v. McDonald, 500 F.2d 1110 (1st Cir. 1974) 21

Statutes and Rules

U.S. Constitution, Amendment I 7, 21

U.S. Constitution, Amendment XIV 13

United States Code

5 U.S.C. §7513 20

28 U.S.C. §1257 ..... 5, 9, 13, 18, 24

Statutes and Rules

Ariz. Rev. Stat. §41-770 ..... 2, 8, 20, 21

Ariz. Rev. Stat. §41-782 ..... 2, 15, 16

Ariz. Rev. Stat. §41-785 ..... 2, 3, 9, 10, 11, 15, 16

Administrative Review Act 11

State Personnel Board
Regulation R-2-5-33 16

I. OBJECT

Pursuant to Rule 16(1)(d) of the Rules of the Supreme Court of the United States, State of Arizona ex rel. Arizona Corporation Commission, Ernest Garfield, B. L. "Bud" Tims, and Al Faron, Commissioners and members of the Arizona Corporation Commission, appellees herein, move this Court to dismiss the appeal on the grounds set forth below.

The basis on which appellant requests review is so imprecisely stated and defined in appellant's Jurisdictional Statement that appellees have great difficulty in responding in an intelligible and reasoned manner based on specific questions of federal law. A recitation of the procedural history of this case in the state courts establishes that appellant's federal claims, whatever appellant may perceive those claims to be, are without merit, and are fictitious and frivolous.

II. NATURE OF THE CASE

The State of Arizona maintains a merit system which governs conditions under which a non-probationary state employee is subject to discipline or to dismissal from state service. The statutory scheme provides procedure for appeal for the employee so affected. Ariz. Rev. Stat. §41-785. Under the statutory scheme, the Arizona Personnel Board is delegated the power to hear appeals and to promulgate rules and regulations relating to personnel matters. Ariz. Rev. Stat. §41-782.

Appellant was dismissed from his position as a hearing officer for the Arizona Corporation Commission on June 21, 1976, on the basis of insubordination, willful disobedience, and improper attitude, each of which, under Ariz. Rev. Stat. §41-770(6), (14), and (4), constitutes cause for dismissal. Appellant appealed his dismissal to

the Arizona Personnel Board, and a hearing was conducted before a hearing officer who issued findings and recommended that appellee be reinstated. The State Personnel Board ultimately rejected the findings of the hearing officer, and upheld the dismissal of appellant.

Appellant then sought review of the Personnel Board in the Superior Court of Maricopa County, as provided for by Ariz. Rev. Stat. §41-785(D). After briefing and oral argument, the Superior Court reversed the decision of the Personnel Board and ordered appellant reinstated.

The next layer of judicial review was to the Arizona Court of Appeals under Ariz. Rev. Stat. §41-785(F). There, the judgment of the Superior Court was reversed and the Personnel Board's decision upholding appellant's dismissal was reinstated. In its opinion, the Court of Appeals held that

there was reasonable evidence to support appellant's dismissal, that the Superior Court's decision to override the Personnel Board's determination on issues of fact was error, and that the State Personnel Board, under applicable state law, is the final fact finder with full authority to reject the recommendation of its own hearing officer, in whole or in part, since the hearing officer merely functions as an advisor or as a convenience for the Personnel Board itself. Evans v. State of Arizona ex rel. Arizona Corp. Com'n, ____ Ariz. ____, 643 P.2d 14 (Ariz. App. 1982).

Finally, discretionary review of the Court of Appeals decision was rejected by the Arizona Supreme Court. This appeal to the United States Supreme Court followed.

III. REASONS WHY THIS COURT'S JURISDICTION HAS NOT BEEN PROPERLY INVOKED

While appellant has characterized the jurisdiction of this Court as based upon 28 U.S.C. §1257(2), appellant has never drawn into question the validity of a statute of the State of Arizona; nor even identified the state statute upon which this Court's purported jurisdiction must rest. Appellant's concerns are not directed at the constitutionality of any state statute encompassed in the Arizona merit system for state employees, but are based upon appellant's belief that the Arizona State Personnel Board and the court of last resort in that state did not reach the right decision, and, thus, due process was violated.

The twenty alleged federal questions raised by appellant in his Jurisdictional Statement are so numerous, generalized, and vague that appellees cannot reasonably ascer-

tain the specific questions which are required to be answered. However, the underlying validity or repugnance to the constitution of any state statute does not appear in that statement. The twenty "Questions Presented" in appellant's Jurisdictional Statement appear to claim that the Arizona Court of Appeals should not have reversed the lower court, and that appellant is somehow entitled to another layer of judicial review of his dismissal from state employment, this time in the United States Supreme Court. For example, appellant's Questions 1, 2, and 5 involve the refusal of the Arizona Supreme Court and the Arizona Court of Appeals to consider appellant's "federal claims" (although appellant fails to identify the "federal claim or claims" purportedly put in issue and ignored).

Questions 3 and 17 assert that the state appellate court did not cite proper authority in its opinion. Questions 6, 7, and 16 claim that there was an incomplete appellate record. Questions 8 and 9 deal with questions of evidence admitted in the administrative personnel hearing; Questions 13 and 14 claim that the regulations promulgated by the State Personnel Board, by which the Board may delegate certain functions to a hearing officer, exceeded that Board's statutory power; Questions 18 and 19 are generally unintelligible but may be characterized as attacking the state court's interpretation of state statutes which governed appellant's dismissal under the merit system. Finally, in Question 20, appellant claims that his dismissal for "improper attitude" purportedly raises an issue under the First Amendment.

To the best of appellees' ability to ascertain, the issues having any semblance of federal questions (and assuming, arguendo, that issues had been identified and ruled upon as such in the state court) are:

(1) Whether the Arizona Court of Appeals could interpret the scope of administrative review under Ariz. Rev. Stat. §41-785(D) as "reasonable evidence" in support of the challenged disciplinary action (as opposed to "substantial evidence");

(2) Whether, under the statutes and regulations governing the state merit system, the State Personnel Board could reach a different decision than that recommended by the hearing officer designated by the Personnel Board to conduct the administrative hearing;

(3) Whether the term "improper attitude" pursuant to Ariz. Rev. Stat.

§41-770(4) constitutes a constitutionally permissible basis for dismissal from state employment.

None of these issues implicate a federal question under 28 U.S.C. §1257(2); or, even assuming, arguendo, that these claims implicate the Constitution of the United States, they do not present a substantial federal question sufficient for this Court's plenary consideration. Finally, none were sufficiently identified and presented as a federal issue in the state court, and, as such, was not necessarily decided by the Arizona Court of Appeals when it affirmed appellant's dismissal from state employment. Finally, even speculating what appellant's purported federal claim or claims could have been, it is clear that appellant's dismissal from state service rests on an adequate non-federal basis.

A. The Scope of Administrative Review Under Ariz. Rev. Stat. §41-785(D)(2), As Applied by the State Court, Is Not a Federal Issue.

Ariz. Rev. Stat. §41-785(D) reads, in pertinent part, as follows:

> Within thirty days after the recording of the order and the mailing thereof, the employee may appeal to the superior court of the county of residence on one or more of the following grounds, that the order was:
>
> 1. Founded on or contained error or law which shall specifically include error of construction or application of any pertinent rules.
>
> 2. Unsupported by any evidence as disclosed by the entire record.
>
> 3. Materially affected by unlawful procedure.
>
> 4. Based on violation of any constitutional provision.
>
> 5. Arbitrary or capricious.

Appellant argues that the application of a standard of "reasonable evidence" by the Court of Appeals, Division One, in uphold-

ing the dismissal of appellant from state employment was improper. Rather, appellant asserts that the appropriate standard for the Superor Court to apply in this instance should have been "substantial evidence." Unfortunately, none of the authorities cited by appellant in which the term "substantial evidence" is applied is based upon a federal constitutional provision, but is based upon judicial interpretation and/or the direct wording of particular statutes such as the Administrative Review Act.

The Arizona Court of Appeals has interpreted the evidentiary standard to be used in administrative actions under the relevant statute (Ariz. Rev. Stat. §41-785(D)) as being "reasonable evidence." That standard for judicial review of an administrative decision under the state statute was based upon the wording

of the statute, and upon prior interpretation of similar statutes by the Arizona appellate court. See Board of Education of Tempe Union High School v. Lammle, 122 Ariz. 522, 526, 596 P.2d 48, 52 (App. 1979).

Thus, the Court of Appeals' decision to apply a "reasonable evidence" standard of review was based upon its own construction of a state statute and upon the rule of stare decisis. While appellant may disagree with that evidentiary standard as applied to dismissal of an employee from state service, appellant has not asserted or identified any provision of the Constitution, or any authority with constitutional underpinnings, that would make the application of such a standard repugnant. This Court has repeatedly held that it will not substitute its judgment for that of a state court in an analysis of evi-

dence, or in weighing of evidence relied upon to support findings of a state court. Garner v. Louisiana, 368 U.S. 157, 166 (1961). The Due Process Clause of the Fourteenth Amendment does not, in and of itself, give jurisdiction to this Court to review purported errors of law, or errors in state procedure allegedly committed by a state court performing in matters that are non-federal in character. McDonald v. Oregon Railroad & Navigation Co., 233 U.S. 665, 669-670 (1914). The standard of sufficiency of the evidence, and the operation of the state merit system to the facts of appellant's conduct are matters uniquely non-federal. All of appellant's claims involving the state court's purported mis-application of state law are non-recognizable under 28 U.S.C. §1257(2), or under the provision for writ of certiorari to this Court.

B. The State Court's Ruling That the State Personnel Board is the Ultimate Fact-Finder and May Reverse the Findings of Its Hearing Officer Does Not Constitute a Federal Issue.

Throughout his jurisdictional statement, appellant refers to the hearing officer for the Personnel Board as "the trier of fact." Appellant expressly and by inference asserts that the Arizona Personnel Board is without power to modify or disregard findings of fact, conclusions of law, and recommendations made by its hearing officers. Appellant seems to assert that delegation of the evidence gathering function to the hearing officer through state regulation and state statute deprives the Personnel Board of its status as fact-finder and decision-maker.

The thrust of appellant's argument is that the Arizona Court of Appeals and the Arizona Supreme Court could not interpret

Ariz. Rev. Stat. §§41-782.01(C) and 41-785(B) as authorizing delegation of the evidence gathering task to a Personnel Board hearing officer without also relinquishing the Personnel Board's right to be the decision-maker in the first instance. In addition, appellant argues that the rules and regulations adopted by the personnel board governing the operation of personnel hearings and the delegation of evidence gathering tasks to the hearing officer cannot be used to support the Court of Appeals' opinion.

Interpretation of state statutes and state agency regulation is reserved to the appellate courts of the state, not to the federal courts. As such, appellant's complaints do not give rise to a colorable constitutional question, since the state courts of Arizona have held, in the present case, that the statutes and the regulations adopted by the Personnel Board authorize

delegation of the evidence gathering task to a hearing officer; and that such a delegation is not a relinquishment of the State Personnel Board's authority to make the ultimate findings of fact, conclusions of law, and order of dismissal.

Removing the state law issues, the only possible federal issue that could have been raised is that the delegation of power to a hearing officer authorized by Ariz. Rev. Stat. §§41-782.01(C) and 41-785(B) is in violation of constitutional principles, specifically, the Fourteenth Amendment guarantee of due process.

Appellant did not delineate or identify the issue in the state court as based on the federal Constitution or federal law. This lack, in itself, precludes the jurisdiction of this Court. Appellant's contention appears to be that, if the State Personnel Board delegates an administrative

hearing to a hearing officer, the Board subsequently cannot draw different conclusions of law and appraise the evidence differently than did its hearing officer, despite State Personnel Board Regulation R-2-5-33(13), which gives the Board broad power to amend or reject the hearing officer's report. Appellant appears to believe that a hearing officer must be the ultimate fact-finder, and that a commission or board cannot reverse his findings. Even if appellant had clearly defined this as a federal constitutional issue in the state court (which he did not), that issue has been resolved. It is clear that such legislative or statutory delegation to a hearing officer is constitutionally permissible. See, e.g., United States v. Raddatz, 447 U.S. 667, 680 (1980); Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); Morgan v. United States, 298 U.S. 468 (1936); Utica Mutual Insurance

Co. v. Vincent, 375 F.2d 129, 132 (2d Cir.), cert. denied, 389 U.S. 839 (1967). The lack of substantiality of a federal question is thus apparent, since the previous decisions of this Court have foreclosed the subject.

C. "Improper Attitude" as a Statutory Reason for Discharge Was Never Identified or Litigated as a Federal Issue in the State Court. In Any Event, the Case is Governed by Arnett v. Kennedy, 416 U.S. 134 (1974).

Appellant obliquely asserts that the term "improper attitude" cannot constitute a reason for discharge from state employment because the term is constitutionally invalid. Appellant's rationale is not only unintelligible, but the issue (assuming it to be that the term "improper attitude" is overbroad and void for vagueness) is barred as justification for this Court's jurisdiction under 28 U.S.C. §1257(2). Appellant failed to bring this newly

asserted federal claim to the attention of the state courts with fair precision, and did not, for example, raise this issue in his claim of error to the Superior Court of Maricopa County. That court's off-hand holding that "improper attitude" was an "amorphous term" that was not definite or certain under Arizona law was made sua sponte by the Superior Court judge, and without briefing by any party.

The highest court of the state failed to pass on appellant's "federal question" and overruled the Superior Court based strictly on its interpretation of state law and authority.

When the highest state court has failed to pass on the purported federal question, it is assumed that the omission was due to the lack of the issue's proper presentation in the state court, unless the contrary can be shown. Street v. New

York, 394 U.S. 576, 582 (1969); Webb v. Webb, ____ U.S. ____, 101 S. Ct. 1889 (1981). The constitutional issues that appellant obliquely refers to in his Jurisdictional Statement in respect to the term "improper attitude" have never been sufficiently or properly raised in state court.

In any event, even if appellant had raised a challenge to the term "improper attitude" as repugnant to the United States Constitution, such a challenge is foreclosed by Arnett v. Kennedy, 416 U.S. 134 (1974), which interpreted the language "such cause as will promote the efficiency of the service" in 5 U.S.C. §7513(a). See, e.g., Meehan v. Macy, 392 F.2d 822, 835 (D.C. Cir. 1968), modified 425 F.2d 469, aff'd en banc 425 F.2d 472 (D.C. Cir. 1969); Phillips v. Adult Probation Department of City and County of San Francisco,

491 F.2d 951 (9th Cir. 1974); Wishart v. McDonald, 500 F.2d 1110 (1st Cir. 1974).

Similarly, the record does not reflect that the constitutionality of appellant's discharge under Ariz. Rev. Stat. §41-770(4), as construed under the First Amendment, was ever presented to the Arizona Court of Appeals, or to the Arizona Supreme Court. The final state court interpretation of "improper attitude" was based solely on state law and state authority.

> Further, the judge did not accept "improper attitude" as a cause justifying removal, stating that the term was too indefinite and uncertain to constitute a cause for dismissal. The judge's decision to overrule the Board's determinations on these issues, where there was "reasonable evidence" in the record to sustain them, constituted error. Neither the trial court nor this Court may ignore A.R.S. §41-770, ... absent a showing that the statute is arbitrary in nature having no substantial relation-

> ship to the end sought to be accomplished. See Civil Service Board of City of Phoenix v. Warren, 74 Ariz. 88, 244 P.2d 1157 (1952). Evans v. State of Arizona ex rel. Corp. Com'n, supra, 643 P.2d at 19.

The issue before the State Personnel Board and the state courts was never whether appellant's conduct and speech were protected expression, but whether an employee in appellant's position would have fair warning that his openly expressed attitudes of misuse, criticism, and hostility were inconsistent with a workable employee relationship and were highly disruptive to the agency. See Evans v. Arizona ex rel. Corp. Com'n, supra, 643 P.2d at 18.

Such critical expression which undermines the effectiveness of the agency crosses the line from protected speech to disruptive attitude. Arnett v. Kennedy, supra, 416 U.S. at 162; Pickering v. Board of Education, 391 U.S. 563 (1968); Smalley

v. City of Eatonville, 640 F.2d 765 (5th Cir. 1981); Sprague v. Fitzpatrick, 546 F.2d 560(3d Cir. 1976), cert. denied 431 U.S. 937 (1977); Kannisto v. City and County of San Francisco, 541 F.2d 841 (9th Cir. 1976), cert. denied 430 U.S. 931 (1977); Roseman v. Indiana University, 520 F.2d 1364 (3d Cir.), cert. denied 424 U.S. 921 (1975); Clark v. Holmes, 474 F.2d 928 (7th Cir. 1972), cert. denied 411 U.S. 972 (1973).

Since appellant's purported First Amendment claim was never raised or identified as such in the state court, the test of Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977), was never applied by the lower court -- i.e., to determine whether appellant would have been discharged from state employment in the absence of the protected speech or conduct.

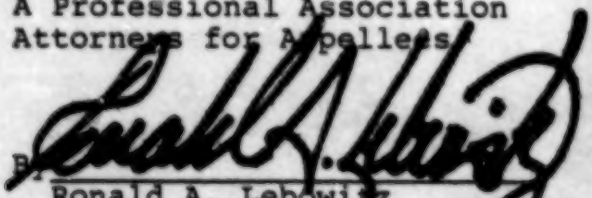
All of these factors, in addition to the fact that appellant's discharge rests on adequate non-federal grounds (for insubordination and willful disobedience) deprive appellant of the right to claim jurisdiction of this Court pursuant to 28 U.S.C. §1257(2), or any other ground.

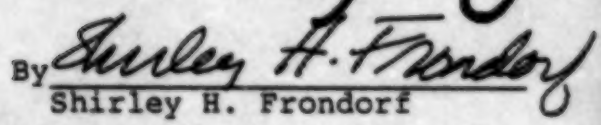
CONCLUSION

None of the jurisdictional prerequisites are present or even properly identified for this Court. Appellant has sought to bring an unwarranted appeal, and this appeal should be dismissed for lack of jurisdiction, with costs assessed against appellant.

Respectfully submitted this 10th day of August, 1982.

LEBOWITZ & FRONDORF
A Professional Association
Attorneys for Appellees

By 
Ronald A. Lebowitz

By 
Shirley H. Frondorf

CERTIFICATE OF SERVICE

STATE OF ARIZONA)
) ss.
County of Maricopa)

SHIRLEY H. FRONDORF, being first duly sworn, upon her oath, deposes and says that she is a member of the Bar of this Court and one of the counsel of record for appellees in this cause; that on this 10th day of August, 1982, she mailed three copies of appellees' Motion to Dismiss in this cause by depositing same in the United States mail, first-class postage prepaid, to:

Lawrence J. Evans Jr.
Attorney at Law
539 East Erie Drive
Tempe, Arizona 85282

and that he also mailed forty copies of appellees' Motion to Dismiss to the Clerk of this Court, first-class postage prepaid, all in compliance with Supreme Court Rule 28.

Shirley H. Frondorf
SHIRLEY H. FRONDORF

SUBSCRIBED AND SWORN to before me this 10th day of August, 1982.

Gayle Westig
Notary Public

My commission expires:

My Commission Expires May 11, 1984